Danaharta Managers Sdn Bhd v Khee Cheong Mesinjahit & Letrik Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22–34 OF 2001
AHMADI ASNAWI JC
25 SEPTEMBER 2008

Companies and Corporations — Debenture — Secured by fixed and floating charge — First defendant's property subject to debenture — Same property encumbered to third defendant vide loan agreement cum deed of assignment and subsequently, replaced by legal charges under National Land Code — Whether first defendant violated debenture — Whether third defendant's interest in priority ranking affected — Companies Act 1965 s 108

The first defendant had, on 25 June 1997, granted the plaintiff's predecessor in title, Sime Bank Bhd, a debenture in consideration of certain banking facilities granted to them. The said debenture was secured by a fixed and floating charge over the first defendant's property, both present and future and the said debenture was registered with the Registrar of Companies under s 108 of the Companies Act 1965 ('the Act'). The first defendant had, pursuant to the said debenture, covenanted that they would not during the subsistence of the debenture execute any form of charge, mortgage, debenture, lien or pledge in respect of any of its assets covered by the said debenture without the written consent of Sime Bank. The plaintiff herein claimed that the first defendant had, without their consent, created six National Land Code ('NLC') charges in respect of a certain Bakawali property as security for the banking facilities granted to them by the third defendant thereby violating the terms of the said debenture. The plaintiff sought, inter alia, for a declaration that the registered interests of the third defendant under the aforesaid charges were not indefeasible and further, an order to set aside the said registered interests. However, the facts which was poignantly ignored by the plaintiff showed that the third defendant's predecessor in title, Chung Khiaw Bank Ltd ('CKBL'), had granted the first defendant loan facilities to purchase the said Bakawali property. To secure the said facilities, a loan agreement cum deed of assignment ('LACDA') was entered between the first defendant and CKBL on 20 November 1993, later to be replaced with a legal charge under the provisions of the NLC upon the issuance of the document of title of the said property. The said LACDA was registered with the Registrar of Companies on 27 November 1993 in compliance with the provisions of s 108 of the Act. The LACDA provided,

inter alia, that the rights, titles and interests of the first defendant under the said sales and purchase agreement were absolutely assigned to CKBL as security for the said facilities. The first defendant was prohibited during the continuance of the LACDA from executing any form of debenture whether fixed or floating over the Bakawali property without the written consent of CKBL. The LACDA would remain in full force until and unless the transfer and charge were duly registered against the document of title of the Bakawali property or the banking facilities paid in full, whichever happens first. The first defendant eventually became the registered proprietor of the Bakawali property on 25 May 1995 when the document of title of the said property was issued on 11 November 1994. Thereafter, pursuant to the terms of LACDA, the first defendant had, on 21 April 1998 replaced the LACDA with the said six NLC charges presently under contention.

Held, dismissing the claim with costs:

(1) There could be no doubt that the Bakawali property was purchased by the first defendant through the banking facilities provided by the third defendant. There was enough evidence to link the LACDA with the facilities given by the third defendant's predecessor in title to purchase the Bakawali property with the creation of the six NLC charges. Additionally the facts and the documentary evidence linking the same were agreed/admitted by the plaintiff. Obviously the plaintiff cannot approbate and reprobate in the same breath (see para 21).

(2) It was an agreed fact that at the time of purchase of the Bakawali property by the first defendant, the title to the property had yet to be issued. It was also an agreed fact that the facilities given to the first defendant by the third defendant were to be secured by way of LACDA later to be replaced with legal charges under the provisions of the NLC upon issuance of the document of title of the said property (see para 26).

(3) Upon the notion that the NLC charges were part and parcel of the LACDA, the third defendant's interest in the priority ranking was thus not affected. The third defendant's interest without a doubt takes precedence to that of the plaintiff (see para 28).

(4) The Bakawali property had from the very beginning been assigned to the third defendant's predecessor in title and as such did not fall under the plaintiff's debenture dated 25 June 1997. If it did, it fell complete with the encumbrance over it of all the rights and interest of the third defendant's predecessor in title under the LACDA which was later replaced with the NLC charges (see paras 28).

[Bahasa Malaysia summary

Defendan pertama telah, pada 25 Jun 1997, memberikan pemilik hak terdahulu dari plaintif, Sime Bank Bhd, satu debentur sebagai balasan untuk kemudahan perbankan tertentu yang diberikan kepada mereka. Debentur tersebut dijamin oleh gadaian tetap dan terapung terhadap harta defendan pertama, kedua-duanya semasa dan masa hadapan dan debentur tersebut didaftarkan dengan Pendaftar Syarikat di bawah s 108 Akta Syarikat 1965 ('Akta tersebut'). Defendan pertama telah menurut debentur tersebut, berjanji bahawa mereka tidak akan semasa hayat debentur memeterai sebarang gadaian, debentur, lien atau jaminan berkaitan dengan aset-asetnya yang dijamin oleh debentur tersebut tanpa persetujuan bertulis Sime Bank. Plaintif di sini memohon bahawa defendan pertama telah, tanpa persetujuan mereka mewujudkan enam gadaian Kanun Tanah Negara ('KTN') berkenaan dengan harta Bakawali tertentu sebagai jaminan untuk kemudahan perbankan yang diberikan kepada mereka oleh defendan ketiga oleh itu mencabuli terma-terma debentur tersebut. Plaintif memohon, antara lain, untuk deklarasi bahawa kepentingan berdaftar defendan ketiga di bawah gadaian yang disebutkan adalah boleh disangkal dan selanjutnya, satu perintah untuk mengenepikan kepentingan-kepentingan berdaftar tersebut. Walau bagaimanapun, fakta yang tidak dihiraukan oleh plaintif menunjukkan bahawa pemilik hak terdahulu defendan ketiga, Chung Khiaw Bank Ltd ('CKBL'), telah memberikan defendan pertama kemudahan pinjaman untuk membeli harta Bakawali tersebut. Untuk menjamin kemudahan tersebut, satu perjanjian pinjaman dan surat ikatan penyerahan hak ('LACDA') dimasuki di antara defendan pertama dan CKBL pada 20 November 1993, yang kemudian digantikan dengan gadaian yang sah di bawah peruntukan KTN dengan pengeluaran dokumen hak milik harta tersebut. LACDA yang didaftarkan dengan Pendaftar Syarikat pada 27 November 1993 mematuhi peruntukan s 108 Akta tersebut. LACDA memperuntukkan, antara lain, bahawa hak, hak milik dan kepentingan-kepentingan defendan pertama di bawah perjanjian jual beli adalah secara mutlak diletak hak kepada CKBL sebagai jaminan untuk kemudahan tersebut. Defendan pertama dilarang semasa penyambungan LACDA daripada memeterai sebarang bentuk debentur sama ada tetap atau terapung terhadap harta Bakawali tanpa persetujuan bertulis CKBL. LACDA akan tetap berkuat kuasa secara keseluruhan sehingga dan kecuali pindahan dan gadaian didaftarkan terhadap dokumen hak milik harta Bakawali atau kemudahan perbankan dibayar secara penuh, mana yang berlaku dahulu. Defendan pertama kemudian menjadi pemilik berdaftar harta Bakawali pada 25 Mei 1995 apabila dokumen hak milik harta tersebut dikeluarkan pada 11 November 1994. Kemudian, menurut terma-terma LACDA, defendan pertama telah, pada 21 April 1998 menggantikan LACDA dengan enam gadaian KTN tersebut yang kini dipertikaikan.

Diputuskan, menolak tuntutan dengan kos:

(1) Tidak dapat diragukan bahawa harta Bakawali dibeli oleh defendan pertama melalui kemudahan perbankan yang diberikan oleh defendan ketiga. Terdapat cukup keterangan untuk menghubungkan LACDA dengan kemudahan yang diberikan oleh pemilik hak terdahulu defendan ketiga untuk membeli harta Bakawali dengan kewujudan enam gadaian KTN. Tambahan, fakta dan keterangan dokumentar menghubungkan yang sama adalah dipersetujui/diakui oleh plaintif. Jelas plaintif tidak boleh aprobate dan reprobate pada masa yang sama (lihat perenggan 21).

(2) Ia adalah fakta yang dipersetujui bahawa pada masa pembelian harta Bakawali oleh defendan pertama, hak milik harta belum dikeluarkan. Ia juga adalah fakta yang dipersetujui bahawa kemudahan yang diberikan kepada defendan pertama oleh defendan ketiga akan dijamin oleh LACDA yang kemudian akan digantikan dengan gadaian sah di bawah peruntukan KTN dengan pengeluaran dokumen hak milik harta tersebut (lihat perenggan 26).

(3) Dengan tanggapan bahawa gadaian KTN adalah sebahagian LACDA, kepentingan defendan ketiga dalam barisan keutamaan tidak terjejas. Kepentingan defendan ketiga, tanpa ragu-ragu, mengatasi kepentingan plaintif (lihat perenggan 28).

(4) Harta Bakawali telah, dari awal diletak hak kepada pemilik hak terdahulu defendan ketiga dan oleh itu tidak terangkum di bawah debentur plaintif yang bertarikh 25 Jun 1997. Jika ia terangkum, ia terangkum sekali dengan dengan bebanan kesemua hak dan kepentingan pemilik hak terdahulu defendan ketiga di bawah LACDA yang kemudian digantikan dengan gadaian KTN (lihat perenggan 28).]

Notes

For cases on debenture generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 121–134.

Cases referred to

Datuk Joginder Singh v Tara Rajaratnam [1983] 2 MLJ 196 (folld)

Lee Tee @ Lee Kim Mok & Anor v Seek Lai Neo & Anor [2000] 1 MLJ 466 (refd)

Malaysian International Merchant Bankers Sdn Bhd v Highland Chocolate and Confectionary Sdn Bhd & Anor (No 2) [1998] 4 CLJ Supp 32 (refd)

Mohamed Isa bin Haji Ibrahim [1968] 1 MLJ 186 (folld)

Public Finance Bhd v Narayanasamy [1971] 2 MLJ 32 (folld)

Legislation referred to

Companies Act 1965 s 108, Forms 34, 40
National Land Code s 340(2)(a)

Faizul Hilmy Ahmad Zamri (Nathan Subramaniam Eliatamby with him) (WY Chan & Roy) for the plaintiff.
Eric Ong Twee Howe (LM Ong & Co) for the defendant.

Ahmadi Asnawi JC:

[1] On 25 June 1997 the first defendant granted the plaintiff's predecessor in title, Sime Bank Bhd, a debenture in consideration of certain banking facilities granted to them as indicated at pp 137–163 of 'Ikatan Dokumen Bersesama' (plaintiff, defendan pertama dan ketiga) marked as 'AB-1'. The said debenture was secured by fixed and floating charge over the first defendant's property, both present and future together with the first defendant's covenant to execute legal or other charges in favour of Sime Bank on any property thereafter acquired by them when so requested by Sime Bank.

[2] By cl 3.03 of the same the first defendant shall not during the subsistence of the debenture execute any form of charge, mortgage, debenture, lien or pledge in respect of any of its assets covered by the said debenture without the written consent of Sime Bank.

[3] The particulars of the said debenture together with its terms and prohibitions were set out in Form 34 dated 26 June 1997 and registered with the registrar of companies with Form 40 on 30 June 1997, as shown at pp 165–175 of AB-1 pursuant to s 108 of the Companies Act 1965.

[4] The said debenture became vested with the plaintiff pursuant to a vesting certificate issued by the High Court on 1 March 1999.

[5] The plaintiff now claims that the first defendant had breached the terms of the said debenture by creating six National Land Code ('NLC') charges in respect of certain Bakawali property in favour of the third defendant without their consent on 21 April 1998 as security for the banking facilities granted by the third defendant to the first defendant vide the following presentations:

(i) No Per 20337/98 Jilid 4259 Folio 70;

(ii) No Per 20338/98 Jilid 4259 Folio 71;

(iii) No Per 20339/98 Jilid 4259 Folio 72;

(iv) No Per 20340/98 Jilid 4259 Folio 73;

A (v) No Per 20341/98 Jilid 4259 Folio 74; and

(vi) No Per 20342/98 Jilid 4259 Folio 75.

[6] The particulars of the registration of the said charges are as indicated at
B pp 268–285 and 291–308 of AB-1.

[7] It is thus the contention of the plaintiff that once the plaintiff's debenture was registered under s 108 of the Companies Act 1965, the third defendant should have or be deemed to have had notice of the plaintiff's
C interest in the matter of Bakawali property and that further transactions of the same must be subjected to the said debenture (*Malaysian International Merchant Bankers Sdn Bhd v Highland Chocolate and Confectionary Sdn Bhd & Anor (No 2)* [1998] 4 CLJ Supp 32). Additionally as the solicitor who conducted the debenture transaction between the first defendant and the
D plaintiff and the six charge transactions between the first defendant and the third defendant was the same solicitor, the third defendant was deemed to have knowledge of the existence of the said debenture. The plaintiff cited *Lee Tee @ Lee Kim Mok & Anor v Seek Lai Neo & Anor* [2000] 1 MLJ 466 as authority for the proposition where it was held there that (at p 478):

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> … it is settled law that the knowledge of a solicitor is regarded by law as the knowledge of the client except where a solicitor acted fraudulently …

[8] In the light of the events enumerated above it was the further
F contention of the plaintiff that the first defendant had committed fraud and that the third defendant was privy to the commission of the said fraud as against the plaintiff. Consequently, following *Public Finance Bhd v Narayanasamy* [1971] 2 MLJ 32, *Mohamed Isa bin Haji Ibrahim* [1968] 1 MLJ 186 and *Datuk Joginder Singh v Tara Rajaratnam* [1983] 2 MLJ 196 the
G third defendant's interest in the said Balawali property is not indefeasible under s 340(2)(a) of the NLC and liable to be set aside as against the plaintiff's claims.

[9] The plaintiff thus proceeded against the third defendant for a
H declaration that the registered interests of the third defendant under the aforesaid six NLC charges is in each case not indefeasible and consequent thereto, an order that the said registered interests be set aside. The plaintiff also prayed for an order that the register and issue document of title pertaining to the said lands be rectified by the cancellation of the said charges
I and the memorials there to. Alternatively the plaintiff prayed for an order relating to the issue of priority between the plaintiff and the third defendant in respect of the said Bakawali property.

[10] However the facts which was poignantly ignored by the plaintiff shows that the third defendant's predecessor in title, Chung Khiaw Bank Ltd ('CKBL') had granted the first defendant loan facilities to purchase the said Bakawali property. The first defendant had on 14 August 1993 agreed to buy the said property from Kemajuan Buditama. The title to the said property had yet to be issued at the time of purchase. To secure the said facilities a loan agreement cum deed of sssignment ('LACDA') was entered between the first defendant and CKBL on 20 November 1993, later to be replaced with legal charge under the provisions of the NLC upon the issuance of the document of title of the said property. The rights, titles and interests of the first defendant under the said sales and purchase agreement were absolutely assigned to CKBL as security for the said facilities. The full terms of the said LACDA are as set out at pp 65–87 of AB-1.

[11] Additionally the first defendant was prohibited during the continuance of the LACDA from among others, executing any form of debenture whether fixed or floating over the Bakawali property without the written consent of CKBL. It is also provided that the LACDA would remain in full force until and unless the transfer and charge were duly registered against the document of title of the Bakawali property or the banking facilities paid in full, which ever happens first.

[12] The said LACDA was set out in Form 34 of the Companies Act 1965 and registered with the Registrar of Companies together with Form 40 on 27 November 1993 as evinced at pp 88–93 of AB-1.

[13] The first defendant eventually became the registered proprietor of the Bakawali property on 25 May 1995 when the document of title of the said property was issued on 11 November 1994. Thereafter pursuant to the terms of LACDA, the first defendant proceeded to replaced the LACDA when legal charges under the provisions of the NLC on 21 April 1998. The said charges were the six NLC charges presently under contention enumerated earlier, which forms the basis of the plaintiff's claim.

[14] The first defendant purchased the said Bakawali property with monies from the banking facilities provided by CKBL. Meanwhile the said LACDA was vested from CKBL to Chung Kiaw Bank (M) Bhd ('CKBM') pursuant to an order of the High Court on 16 April 1994. Again the said LACDA was vested from CKBM to the third defendant by order of the High Court on 12 May 1997.

[15] These sailent facts were admitted by the plaintiff as indicated in items 5, 6, 7, 8, 9 and 10 of the document 'fakta-fakta yang dipersetujui' (antara plaintiff dan defendan ketiga), marked as 'A'.

[16] On the facts I am with the learned counsel for the third defendant submissions that all the arguments submitted by the plaintiff against the NLC charges vis-à-vis the plaintiffs debenture equally apply to the third defendant's position in respect of the LACDA which was later replaced by the charges under the NLC. It was admitted by the plaintiff that the said LACDA was registered with the ROC in compliance with the provisions of s 108 of the Companies Act 1965. As argued by the plaintiff, upon such registration, the plaintiff should have or deemed to have had knowledge/notice of the third defendant's interest in respect of the Bakawali property. It is equally the law that upon creation of the debenture and its registration thereof, the first defendant's asset was encumbered with the interest of the third defendant and consequently there was no interest or title that the first defendant could pass over to the plaintiff, bearing always that the third defendant's interest came first in point of time.

[17] Equally the argument of the plaintiff that the first defendant had committed fraud against the plaintiff in registering the said six charges under the NLC without the prior consent of the plaintiff and that the third defendant was privy to the commission of the said fraud equally applies to the third defendant's position in respect of their LACDA. The plaintiff knew or was deemed to have knowledge of the third defendant's interest in the Bakawali property through the registration of the said LACDA under s 108 of the Companies Act 1965, but yet they proceeded to create the said debenture. Under the circumstances, the plaintiff was privy to the act of the first defendant in defrauding the third defendant. All the more so when the first defendant executed the debenture with the plaintiff over the said Bakawali property without the written consent of the third defendant when it was mandated so under the LACDA.

[18] Confronted with these factual matrix, the plaintiff now argues that the third defendant's contention that the said six charges were created (as security to purchase the Bakawali property) to replace the LACDA were not supported by the facts of the case. The plaintiff went on to say that apart from the learned third defendant's counsel submission in court that the charges were created to replace the LACDA, no evidence was produced to support such submission.

[19] It was further submitted by learned counsel for the plaintiff that the facilities secured under the said charges were new facilities which have no connection with the facilities under LACDA and that there is nothing to show that the charges were created to replace the LACDA.

[20] However, in my view the particulars in the document marked A — 'fakta-fakta yang dipersetujui' — speaks for itself. The following are the

points of facts that the plaintiff had agreed/admitted in document A. In item 05 of document A, the plaintiff agreed/admitted the following: A

> By SPA dated 14 August 1993, the first defendant agreed to purchase the Bakawali property from Kemajuan Buditama. Title to the property was yet to be issued at that time. B

By item 06 of document A:

> The first defendant obtained banking facilities from Chung Khiaw Bank Limited to finance the said purchase and by loan agreement cum deed of assignment ('LACDA') dated 20 November 1993 entered between first defendant and CKBL the rights, titles and interests of the first defendant under the SPA were absolutely assigned to the bank as security therefor. C
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> The first defendant covenanted that upon being so required by CKBL issuance of a separate document of title to the Bakawali property take the transfer thereof from Kemajuan Buditama and charge it to CKBL as security for the banking facilities. D
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> The LACDA would remain in full force until and unless the transfer and charge were duly registered against the document of title of the Bakawali property or the banking facilities paid in full, which ever happens first. The first defendant purchased the Bakawali property with monies from the banking facilities. E

By item 07 of document A:

> Particulars of LACDA 20 November 1993 were set out in Form 34 dated 23 November 1993 and lodged with ROC together with Form 40 dated 27 November 1993. F

By item 13 of document A:

> first defendant created six NLC charges in favour of the third defendant over the Bakawali property as security for the banking facilities … G

By item 17 of document A:

> Sime Bank did not obtain the written consent of the third defendant for to debenture dated 25 June 1997. H

[21] In the light of what has been agreed between the parties indicated above I find it very difficult to digest the plaintiff's submission relating to the same. There can be no doubt that the Bakawali property was purchased by the first defendant through the banking facilities provided by the third defendant. The evidence is also very clear that the facilities offered by the third defendant relates to the purchase of the said Bakawali property by the first defendant. Obviously the plaintiff cannot approbate and reprobate in the I

same breath. The plaintiff cannot now deny what they have agreed to from the very beginning.

[22] There were also other evidence to support the same. The LACDA itself is replete with references relating to the purchase of the Bakawali property through the utilisation of the said banking facilities. This agreement is also included in the agreed bundle AB-1, as shown at pp 65–87. Clause I refers to the consideration for the LACDA. Clause 8 also talks about the consideration of the assignment. Recitals 6 defined the banking facilities offered by the third defendant which is the consideration for the LACDA. Clause 26 talks about the creation of the NLC charges upon issuance of separate document of title of the said Bakawali land.

[23] In my view there are more than enough evidence to link the LACDA with the facilities given by the third defendant's predecessor in title to purchase the Bakawali property with the creation of the six NLC charges. Additionally the facts and the documentary evidence linking the same were agreed/admitted by the plaintiff.

[24] At the end of the day, in my view there is no issue of fraud here as contended by the plaintiff.

[25] On the other hand it rather involved the question of law on the priorities between the plaintiff's debenture dated 25 June 1997 as against the subsequent NLC charges enforced by the third defendant pursuant to LACDA dated 20 November 1993. It is in the 'fakta-fakta yang dipersetujui', document A, that the LACDA was lodged with the ROC in compliance with s 108 of the Companies Act 1965. As such upon such registration the plaintiff should have or deemed to have knowledge/notice of the third defendant's interest in respect of Bakawali property through the LACDA. Though the LACDA provides for consent, the plaintiff did not obtain the said consent from the third defendant before proceeding to create the 25 June 1997 debenture. The cumulative impact of all these is that the third defendant's interest in the Bakawali land is safe. The first defendant could not now pass the title or interest in the said property to the plaintiff as the said property was encumbered with the interest of the third defendant at the material time. In short there was no interest or title that the first defendant could pass around without the consent of the third defendant. In the event there is nothing for the third defendant to take away from the plaintiff for all along the interest in the Bakawali property has been with the third defendant ever since the creation and registration of the LACDA. Indeed the first defendant was only holding the land and/or interest therein as bare trustee for the third defendant.

[26] Though the third defendant's interest through the LACDA (20 November 1993) came first in point time in relation to the plaintiff's debenture (25 June 1997), but the NLC charges were created on 21 April 1998 which was subsequent to the creation of the plaintiff's debenture. However in my view the creation or registration of the NLC charges subsequent to the plaintiff's debenture cannot be taken in isolation with the preceding events. The registration of the NLC charges were part and parcel of the LACDA. The third defendant was only enforcing their rights under the LACDA. There is nothing in law to prevent them from doing so. It is an agreed fact that at the time of purchase of the Bakawali property by the first defendant, the title to the property has yet to issued. It is also an agreed fact that the facilities given to the first defendant by the third defendant were to be secured by way of loan agreement cum deed of assignment later to be replaced with legal charges under the provisions of the NLC upon issuance of the document of title of the said property. It is also an agreed fact that by item 6 of document A '… the first defendant covenanted that upon being so required by CKBL issuance of a separate document of title to the Bakawali property, take the transfer thereof from Kemajuan Buditama and charge it to CKBL as security for the banking facilities …'. The delay in the registration of the charges was without a doubt due to the delay in the issuance of the document of title of the said property which was occasioned through no fault of either the first or third defendant. Had the titles been available at the time of purchase, I am fairly convinced that there is no need for the LACDA and the charges would have been registered forthwith there and then.

[27] Consequently the third defendant certainly cannot be deprived of its rights to enforced the terms of the LACDA by insisting that the first defendant do replace the loan agreement cum deed of assignment with legal charges under the provisions of the NLC. The creation of the six NLC charges is thus proper and regular. There can be no fraud in enforcing one's rights under the law or under the terms of a regular contract.

[28] Upon the notion that the NLC charges were part and parcel of the LACDA, the third defendant's interest in the priority ranking is thus not affected. The third defendant's interest without a doubt takes precedence to that of the plaintiff. In this respect I am with the learned counsel for the third defendant's submission that the Bakawali property had from the very beginning been assigned to the third defendant's predecessor in title and as such did not fall under the plaintiff's debenture dated 25 June 1997. If it did, it fell complete with the encumbrance over it of all the rights and interest of the third defendant's predecessor in title under the loan agreement cum deed of assignment which was later replaced with the NLC charges.

A **[29]** For all the reasons aforesaid given, the plaintiff's claim is dismissed with costs.

Plaintiff's claim dismissed with costs.

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Reported by Ashgar Ali Ali Mohamed

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